

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs January 26, 2005

RICKY LYNN EARLS v. STATE OF TENNESSEE

Appeal from the Circuit Court for Bedford County
No. 9404 Lee Russell, Judge

No. M2003-01741-CCA-R3-PC - Filed April 19, 2005

The Defendant, Ricky Lynn Earls, was convicted by a jury of theft of property over \$1,000, a Class D felony. See Tenn. Code Ann. § 39-14-105(3). The trial court subsequently sentenced the Defendant as a career offender to twelve years in the Department of Correction. The Defendant's conviction was affirmed by this Court on direct appeal. See State v. Ricky Lynn Earls, No. M2001-00063-CCA-R3-CD, 2001 WL 1285927 (Tenn. Crim. App., Nashville, Oct. 25, 2001). The Defendant subsequently filed for post-conviction relief, alleging ineffective assistance of counsel. After a hearing the trial court denied relief. This appeal followed. We remand this cause for further findings by the trial court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Reversed;
Remanded**

DAVID H. WELLES, J., delivered the opinion of the court, in which JERRY L. SMITH and ROBERT W. WEDEMEYER, JJ., joined.

Richard A. Cawley (at trial) and Hayley E. Fults (on appeal), Shelbyville, Tennessee, for the appellant, Ricky Lynn Earls. Ricky Lynn Earls, Pro Se.

Paul G. Summers, Attorney General and Reporter Elizabeth B. Marney, Assistant District Attorney General; Mike McCown, District Attorney General; and Michael Randles, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The Defendant was tried by a jury and convicted of theft over \$1,000 in July 2000. His sentencing hearing was held on September 7, 2000, and a judgment of conviction was thereupon entered. Defense counsel did not file a motion for new trial until December 6, 2000. The motion raised two issues: sufficiency of the evidence and the propriety of the sentence. Although clearly filed beyond the thirty-day time limit, see Tenn. R. Crim. App. 33(b), a hearing on the Defendant's

motion for new trial was held on December 7, 2000, during which the Defendant testified. The State did not raise an objection based upon the timeliness of the motion. The trial court overruled the motion, finding the issues raised therein, along with other issues raised during the hearing, to be without merit. The Defendant subsequently appealed his conviction, raising sufficiency of the evidence as the only issue. This Court affirmed the Defendant's conviction. See State v. Ricky Lynn Earls, No. M2001-00063-CCA-R3-CD, 2001 WL 1285927 (Tenn. Crim. App., Nashville, Oct. 25, 2001).

In his petition for post-conviction relief, the Defendant raised numerous allegations of ineffective assistance of counsel, including the fact that his motion for new trial "was not timely filed and as a result, it limited the issues that could be addressed on direct appeal." At the hearing on the Defendant's petition for post-conviction relief, the Defendant's trial lawyer ("Counsel") acknowledged that the motion for new trial was filed late. An associate of his filed it because he was recuperating at home from an illness in December 2000. Counsel did not offer a further explanation as to why the motion was not filed in September or early October. Counsel did state that he did not think there were other significant issues that should have been raised in the motion.

Donna Hargrove, an attorney in the Public Defender's office with Counsel, testified that she worked on the Defendant's case, but was not his trial lawyer. She prepared and filed the Defendant's motion for new trial. With respect to the timing of its filing, she testified as follows:

Well, [Counsel] had had some health problems. I was actually unaware that the motion had not been filed. [Counsel] had had some health problems; he ended up having a heart attack and I don't remember when exactly he had the heart attack. Even before that, he had some health problems and was in and out of work. And again, we were already one attorney short, so we were quite underhanded in trying to cover all of our courts. I did not know the motion for new trial had not been filed then. It c[a]me to my attention that [Counsel] was not going to be physically able to be at work for a while and I knew we had to be over here on Judge Russell's date. I believe it was the 7th of whatever that was, several days, maybe a week before that when I realized that. I set out to look at what the issues were, if there were any issues and I filed the motion the day before [the motion for new trial hearing].

In preparation for filing the motion, Ms. Hargrove spoke to Counsel and reviewed the trial notes. She did not review the transcript of the trial. She had not been present at the trial. She did not remember speaking with the Defendant about the motion. She relied on Counsel as to what to include in the motion.

Ms. Hargrove testified that she did speak with the Defendant on the day of the motion hearing. She told the Defendant that she was going to let him testify at the hearing on the motion "out of an abundance of caution" so as to include any issues that the Defendant wanted to be considered and that were not included in the written motion. She did not, however, recall what the Defendant stated while on the stand, and did not remember if he specified any issues that should

have been included in the written motion for new trial. She did state that the Defendant was “very capable of communicating to the Court, very clearly,” and that “he was all for getting up and letting the Court know what he thought about what needed to be raised.”

The Defendant testified that he was sentenced on September 7th and transported to West Tennessee State Prison on September 26th. He stated that he had been writing Counsel “about issues we should bring up.” The Defendant did not know until the day of the new trial motion hearing that Counsel had had a heart attack. He looked over Counsel’s paperwork and discovered that Counsel had not filed his motion for new trial. Ms. Hargrove told him that he would be allowed to testify at the hearing about issues he wanted to bring up. The Defendant protested that he had never had a jury trial before, and that he did not know what to bring up. Nevertheless, the Defendant testified at his new trial hearing about various issues he felt needed to be addressed. The trial court corrected him during his testimony, explaining which issues were appropriate for direct appeal and which were appropriate for post-conviction proceedings. The Defendant stated at the post-conviction hearing, “I didn’t know if I got everything in or not,” but did express confidence that he brought up at least several issues that should have been included in his motion for new trial.

On cross-examination, the Defendant acknowledged telling the trial court at the new trial hearing that he thought the State’s response to his discovery request was inadequate, and that there was “no corroborating evidence.” He also raised an issue about whether his mother should have been called as a witness. After the post-conviction hearing, the trial court made findings from the bench and denied relief. The trial court subsequently issued a written order denying relief. In neither instance did the trial court address the Defendant’s allegations concerning his motion for new trial.

ANALYSIS

Both the Sixth Amendment to the United States Constitution and Article I, Section 9 of the Tennessee Constitution guarantee a criminal defendant the right to representation by counsel. See State v. Burns, 6 S.W.3d 453, 461 (Tenn. 1999); Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). Both the United States Supreme Court and the Tennessee Supreme Court have recognized that the right to such representation includes the right to “reasonably effective” assistance, that is, within the range of competence demanded of attorneys in criminal cases. See Strickland v. Washington, 466 U.S. 668, 687 (1984); Burns, 6 S.W.3d at 461; Baxter, 523 S.W.2d at 936.

A lawyer’s assistance to his or her client is ineffective if the lawyer’s conduct “so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” Strickland, 466 U.S. at 686. This overall standard is comprised of two components: deficient performance by the defendant’s lawyer, and actual prejudice to the defense caused by the deficient performance. See id. at 687; Burns, 6 S.W.3d at 461. The defendant bears the burden of establishing both of these components by clear and convincing evidence. See Tenn. Code Ann. § 40-30-110(f); Burns, 6 S.W.3d at 461. The defendant’s failure to prove either deficiency or prejudice is a sufficient basis upon which to deny relief on an ineffective assistance of counsel claim. See Burns, 6 S.W.3d at 461; Goad v. State, 938 S.W.2d 363, 370 (Tenn. 1996).

In evaluating a lawyer's performance, the reviewing court uses an objective standard of "reasonableness." See Strickland, 466 U.S. at 688; Burns, 6 S.W.3d at 462. The reviewing court must be highly deferential to counsel's choices "and should indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Burns, 6 S.W.3d at 462; see also Strickland, 466 U.S. at 689. The court should not use the benefit of hindsight to second-guess trial strategy or to criticize counsel's tactics, see Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982), and counsel's alleged errors should be judged in light of all the facts and circumstances as of the time they were made, see Strickland, 466 U.S. at 690; Hicks v. State, 983 S.W.2d 240, 246 (Tenn. Crim. App. 1998).

A trial court's determination of an ineffective assistance of counsel claim presents a mixed question of law and fact on appeal. See Fields v. State, 40 S.W.3d 450, 458 (Tenn. 2001). This Court reviews the trial court's findings of fact with regard to the effectiveness of counsel under a de novo standard, accompanied with a presumption that those findings are correct unless the preponderance of the evidence is otherwise. See id. "However, a trial court's conclusions of law--such as whether counsel's performance was deficient or whether that deficiency was prejudicial--are reviewed under a purely de novo standard, with no presumption of correctness given to the trial court's conclusions." Id.

Our supreme court has recently issued an opinion in a case bearing close similarity to the Defendant's. See Wallace v. State, 121 S.W.3d 652 (Tenn. 2003). In that case, the defendant had retained counsel to defend him against a charge of first degree murder. Their agreement included a provision that counsel would be responsible only for the defendant's representation at trial and would not be responsible for handling any potential appeals. See id. at 654. The defendant was convicted as charged after a jury trial. Id. After the conviction, counsel sent the defendant a letter instructing him on how to file a motion for new trial and the issues he should include. However, counsel did not obtain court approval to withdraw. Id. at 654-55. The defendant timely filed his pro se motion for new trial. Id. at 655. Because the defendant still had counsel of record, the trial court refused to consider the defendant's pro se filing. Id. Counsel subsequently filed a late motion for new trial and sought to be relieved from his representation of the defendant. Id. The defendant also filed a second pro se motion for new trial, which motion was also not timely. The defendant's second motion included issues other than sufficiency of the evidence. Id. (The record before the supreme court did not include the defendant's first motion. Id. at n.3). The trial court granted counsel's request to be relieved from further representing the defendant but did not grant either of the late-filed motions for a new trial. Id. at 655.

The defendant pursued his direct appeal but this Court concluded that, because the motions for new trial had been untimely, all issues were waived except for sufficiency of the evidence. See id. This Court determined that the evidence was insufficient to support the defendant's first degree murder conviction, and thus modified the conviction to second degree murder. This Court remanded the case to the trial court to resentence the defendant for second degree murder. See id.

Eventually, the defendant filed for post-conviction relief alleging that his trial counsel had been ineffective in failing to file a timely motion for new trial. Id. After a hearing, the trial court agreed and granted the defendant a delayed appeal. Id. This Court then dismissed the delayed appeal, concluding that the defendant had received a direct appeal, albeit only upon the sufficiency of the evidence, and that the defendant had therefore not been prejudiced. See id. at 655-56. Our supreme court subsequently reversed this Court and reinstated the defendant's delayed appeal. Id. at 660.

In reviewing the defendant's case, our supreme court initially concluded that "counsel's failure to file a timely motion for new trial, as well as his failure to withdraw so as to allow the defendant to file a pro se motion for new trial, was deficient." Id. at 657. Accordingly, the defendant satisfied the first prong of the Strickland test. With respect to the second prong, our supreme court first determined that "the prejudice prong of the analysis can [not] be resolved simply by reasoning that [the defendant] had direct review on the issue of sufficiency of evidence alone." Id. at 658. Furthermore, under the circumstances of the defendant's case, he was not required to demonstrate actual prejudice from his lawyers's deficient performance. Id. Rather, "[c]ounsel's deficient performance was . . . presumptively prejudicial" because

[c]ounsel's abandonment of his client at such a critical stage of the proceedings resulted in the failure to preserve and pursue the available post-trial remedies and the complete failure to subject the State to the adversarial appellate process. Counsel's deficient performance was, therefore, presumptively prejudicial and supported the trial court's grant of a delayed appeal under Tennessee Code Annotated section 40-30-113.

Id. (citation omitted). Our high court recognized that "the key issue is the failure of trial counsel to file the specified pleading resulting in the defendant being deprived of complete appellate review on direct appeal." Id. at 659 (emphasis added). Thus, the court concluded, "[a]s a direct result of counsel's ineffective assistance, the defendant was procedurally barred from pursuing issues on appeal, and the State's case was not subjected to adversarial scrutiny upon appeal." Id. at 660.

Significantly, our supreme court rejected a per se rule regarding a trial lawyer's failure to file a motion for new trial. Rather, in order to be entitled to relief, "a petitioner in a post-conviction proceeding must establish that he or she intended to file a motion for new trial and that but for the deficient representation of counsel, a motion for new trial would have been filed raising issues in addition to sufficiency of the evidence." Id. at 659.

In the instant case, we have no hesitation in concluding that Counsel's failure to file timely a motion for new trial on behalf of the Defendant was deficient performance. Thus, the Defendant has satisfied the first prong of the Strickland test. We further conclude that the Defendant has established one of the two prerequisites for a finding of presumed prejudice resulting from this deficient performance. The Defendant testified that, after his sentencing hearing, he began writing to Counsel "about issues we should bring up." Although the Defendant explained that he was not

familiar with the process surrounding motions for new trial because all of his prior convictions had stemmed from guilty pleas, he was apparently aware that some further proceedings were available, and he was making efforts to ensure that his lawyer took advantage of them. A motion for new trial was eventually filed, indicating that Counsel knew that the Defendant wanted to pursue his post-trial remedies. We find that the proof adduced at the post-conviction hearing indicates by clear and convincing evidence that the Defendant intended to file a motion for new trial.

As set forth above, to be entitled to relief, the Defendant must also establish that, but for Counsel's deficient performance, his motion for new trial would have contained issues in addition to sufficiency of the evidence. Counsel testified that he did not believe that there were additional significant issues that should have been included in the motion for new trial. The Defendant testified that he raised a variety of issues during the new trial hearing, including an issue involving the State's response to a discovery request. Unfortunately, the transcript of the hearing on the Defendant's motion for new trial is not before this Court.¹ Nor did the post-conviction court make any findings about the Defendant's allegations regarding his motion for new trial.² Accordingly, on the record before this Court, we are unable to determine whether the Defendant's motion for new trial would have included issues in addition to sufficiency of the evidence had Counsel not performed in a deficient manner. This is an issue of fact which should have been determined by the trial court. This Court does not have the authority to make findings of fact because our jurisdiction is appellate only. See Tenn. Code Ann. § 16-5-108(a).

Therefore, we have no choice but to remand this matter to the trial court for a determination of whether, but for Counsel's deficient performance, a motion for new trial would have been filed raising issues in addition to sufficiency of the evidence. If the trial court so determines, it must grant the Defendant a delayed appeal, with the opportunity to first file a delayed motion for a new trial.

This case is remanded for proceedings consistent with this opinion.

DAVID H. WELLES, JUDGE

¹We note, however, that the trial court's order denying the Defendant's motion for new trial references both the issues raised in the written motion and "all issues raised by the Defendant orally at the hearing."

²In fairness to the trial court, we point out that the Wallace decision had not been filed at the time of the hearing on the instant post-conviction petition.